IGNORANCE OF IMPOSSIBILITY AS AFFECTING CONSIDERATION

THERE seems to be considerable unanimity of opinion among courts and legal writers that if one of two parties to a bilateral agreement is *unaware* that the promise of the other is because of the law impossible of being carried out, or of even being seriously considered, the party so unaware, upon a breach of the promise, may sue in *contract*. It does not seem to the writer that this is a correct view to take of the matter, but that the true ground of recovery in such a case is estoppel, or if there has been fraud, that a tort action for deceit is the appropriate action to bring.[1]

In a well-known work on contracts [2] it is said, "When a positive rule of law renders the consideration impossible it will not support a contract." This thesis is then illustrated by three examples: (1) "As where a person being indebted to another agreed with the servant of his creditor that, in consideration of the servant discharging him for the debt, he would do certain work;" [3] (2) "a promise that another's land shall sell for a certain sum on a given day;" [4] (3) "a promise to marry by one already married and known so to be by the other." [5]

In the first of the cases quoted the inability of the servant to legally discharge his master's debt made the consideration impossible of rendition and the contract void. In the second the same reason holds, — the impossibility in law of compelling the sale of another's land within a certain time or for a certain price. But it is in the third example that the words occur to which I wish to direct attention — "*and known so to be by the other.*" Only here is the *state of mind of the promisee* toward the promise depicted as having any bearing on the character of the promise as consideration. It is no consideration (and therefore no contract) for A to promise to marry B under these circumstances, and for apparently

[1] ASHLEY, THE LAW OF CONTRACTS, § 47; HARRIMAN ON CONTRACTS, 2 ed., § 233; CLARK ON CONTRACTS, § 180. But see WALD'S POLLOCK ON CONTRACTS, 396, note "S."

[2] ELLIOTT ON CONTRACTS, § 226.

[3] Harvy *v.* Gibbons, 2 Lev. 161 (1674); WALD'S POLLOCK ON CONTRACTS, 524.

[4] Stevens *v.* Coon, 1 Pinney (Wis.), 356 (1843).

[5] Paddock *v.* Robinson, 63 Ill. 99 (1872).

two reasons: (1) A is already married, and (2) B *knows* that fact. One is, it appears, just as much a factor as the other. If regard were had solely to the matter of legal impossibility, one might rather naturally think the first of the given reasons amply sufficient by itself, and the second superfluous or irrelevant. In point of logic, at any rate, any given thing which *is* impossible in fact would seem not to be less so because of the belief or unbelief as to its possibility on the part of one attempting to deal with it. It matters not whether the impossibility is physical or legal: One may think that he can tread on air, or commit a legal murder, but his thought about the matter would have no influence to change the outcome of his attempt to do either. And it would seem to be true that A's promise to B to do either of these things would be of precisely equal value to B, whether A thought it possible to execute either feat, or impossible. In other words, you have on the one hand a state of mind, a subjective thing, and on the other a state of fact, an objective thing; and the whole purpose of this article is to cast a doubt, at least, on the propriety of allowing the former to count as consideration, when the consideration asked for is the latter.

In order to show that this is done, let us take the case suggested by the opening paragraph — a case just the opposite of the one we have been considering — one where the promisee is *unaware* of the legal impossibility involved, and where consequently courts and writers on the law seem to be equally at one in holding that there *is* a contract.[6] Two cases illustrate this doctrine: *Wild* v. *Harris*[7] and *Millward* v. *Littlewood*.[8] In both cases a married man promised to marry an unmarried girl who was ignorant of his existing status, in return for her promise made in good faith to marry him. In each case, the girl suing him in *assumpsit* for breach of promise was allowed to recover. In the former of the two cases it was urged in defense that no consideration for the defendant's promise had been shown, since the plaintiff on her own part could not perform her promise to marry defendant; and it was also said that a consideration is insufficient, if its performance be utterly impossible. Counsel also suggests that defendant might have

[6] See page 1, note 1. See also WILLISTON ON SALES, § 663, note 4.

[7] 7 C. B. 999 (1849).

[8] 5 Exch. 775 (1850); 2 WILLISTON, CASES ON CONTRACTS, 552.

rendered himself liable to a tort action for deceit — a view of the matter which later commended itself to an American court.[9] In deciding the case of *Wild* v. *Harris* for the plaintiff, Wilde, C. J., held that the promise alleged was to marry the plaintiff within a reasonable time; and that the plaintiff's counter-promise to marry the defendant within a reasonable time was, for one thing, "not absolutely impossible of performance, for his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise to the plaintiff." This means of outflanking the fortress of legal impossibility thus seized upon by the English judge did not meet with the approval of the court in *Noice* v. *Brown*,[10] on the theory that the practical effect of it was to make the law countenance an agreement in derogation of the marriage relation, and establish a rule contrary to public policy. This would, doubtless, be the judgment of most courts to-day.[11] An agreement to marry after the death or divorce of a present spouse would be just as void, just as impossible for the law to consider seriously or permit, as would be under the same circumstances an agreement to marry presently. But however that may be, it is with the latter kind of case, and not with the former, that I wish to deal. In order that the discussion may be more clear, let us take as our model the following A B case:

A, a married man, intending to deceive B, an unmarried girl ignorant of A's existing marriage, promises to marry B presently, and in return for his promise requests and obtains B's promise to marry him presently.

The question is, can there be found in such a combination of facts any consideration upon which a contract can be erected that is binding upon A, and if so, what is it that B does that constitutes such consideration?

The usual answer, or an essential part of it, as has already been pointed out, is that B is *ignorant* of A's existing marriage, and that *therefore* an action *ex contractu* lies.[12] When so stated, it seems

[9] Pollock *v.* Sullivan, 53 Vt. 507, 38 Am. Rep. 702 (1880). See also Blattmacher *v.* Saal, 29 Barb. (N. Y.) 22 (1858). Opposed to these two cases, which seem to the writer to take the right view, are Coover *v.* Davenport, 1 Heisk. (Tenn.), 368 (1870), and Kelley *v.* Riley, 106 Mass. 339 (1871).

[10] 38 N. J. L. 228 (1876); 2 WILLISTON, CASES ON CONTRACTS, 543.

[11] Brown *v.* Odill, 104 Tenn. 250, 56 S. W. 840 (1900).

[12] Coover *v.* Davenport, 1 Heisk. (Tenn.), 368, 377: "As plaintiff did not know that defendant was married, it was a lawful contract on her part," etc.

like the baldest kind of an assumption, unless it is really meant that ignorance *is* the consideration. Unless this is intended, then consideration is assumed here and not proved. It is equally and for the same reason an assumption to say that there is a contract voidable at B's option on her discovery of A's fraud. In spite of exceptions, in our law one does not talk of contract as a usual thing without first making sure that consideration is there. Neither does it seem satisfactory to say with the court in *Coover* v. *Davenport* that there is a lawful contract *on the part of the innocent party*, for the same assumption is here made, and the statement implies a belief that a contract may be made by one party out of his own promise, whereas in a bilateral contract there must be two promises, each of which, in some way, furnishes consideration for the other.

Professor Langdell says, "Both the mutual promises must be binding, or neither will be, . . . for if one of the promises is for any reason invalid, of course the other has no consideration, and so they both fall."[13] In *Kelley* v. *Riley*[14] it is said:

"The strict rule that a consideration to support a promise is insufficient, if its performance is utterly and naturally impossible, is met by the suggestion, that even if the future performance here [*i. e.*, the agreement here was to marry within a reasonable time after making it] is to be treated as utterly impossible, yet the detriment or disadvantage which must necessarily result to the plaintiff in relying for any time on the promise affords sufficient consideration to support the defendant's contract."

This is not very convincing, and is, in fact, the first ground of judgment in *Wild* v. *Harris*. It seems to be a sufficient reply to say that it is not the consideration defendant asked for. Mere reliance upon a promise is not to be accounted consideration, even though detriment accompanies such reliance, and the reliance was reasonable, natural, and innocent. At least such facts would not constitute consideration in any widely accepted definition of that term. True, the consideration defendant asked for (a promise of marriage) was impossible of fulfilment; still it may, I think, be questioned whether that fact gives a court the right to say, "Because the consideration you asked is an impossible one, you must therefore take as your consideration and be bound in a contract thereby

[13] SUMMARY OF THE LAW OF CONTRACTS, § 82.

[14] 106 Mass. 339, 342 (1871).

something you did not ask for." Back of this attitude of the courts it is hard to avoid seeing as its more or less unconscious motive and source, perhaps, a certain indignation at the defendant's wrongful conduct, and a feeling that he is not in a position to object to being harnessed in a contract, since at any rate he is the author of his own woes. Doubtless such a view is justified as far as the defendant personally is concerned, but what about legal theory? Does an immoral man cease in the eyes of the law because of his immoral tendencies to be capable of setting his personal estimate on the relative values of things? Can he, in other words, no longer lawfully know his own mind? Of course he cannot be allowed to carry out his project, but the question that concerns us is merely this: Is it good legal theory to say that the defendant is not only to be so prevented, but that also he is guilty of the breach of a contract made upon a consideration he did not ask for, but which the law provided, in order to fix a contract liability upon him? This appears to be undesirable. "The consideration is the matter accepted or agreed upon as the equivalent for which the promise is made."[15]

In *Meyer* v. *Haworth*[16] the facts were that a merchant had sold goods to a married woman supposing her to be single. Later he sued her in *assumpsit*, relying on her promise to pay for the goods made by her subsequent to her husband's death. It was held there was no consideration for her second promise, since the first promise (made during her coverture) to pay for the goods was wholly void. Professor Williston says in this connection:

"A promise which is void is insufficient consideration, and the cases indicate no inquiry on the part of the court whether the party giving a promise in exchange for the void promise knew or did not know the facts which made void the promise he received."[17]

In a note to the same passage the same writer suggests,

"If lack of knowledge of these facts made a difference, it might be urged that mistake rather than lack of consideration was the reason for the invalidity of the bargain."

If the promisee's "unawareness" of the invalidity of the other's promise does not form consideration and give rise to a contract

[15] LEAKE ON CONTRACTS, 6 ed., 435.
[16] 8 A. & E. 467 (1838).
[17] 27 HARV. L. REV. 517.

in *Meyer* v. *Haworth*, why should it do so in our A B case? The girl's promise seems in no respect to be a more substantial consideration than the married woman's. Both are void in law when made. "A void agreement is one which entirely fails to receive legal recognition or sanction, the declared will of the parties being wholly destitute of legal efficacy.[18] Holland sets down as the third constituent element of a contract, "The matter agreed upon must be at the time of the agreement both possible and legally permissible." [19] Terry writes, "We speak of a void contract, although an agreement which is simply void is not perhaps in strictness a contract at all." [20] And, indeed, how can the most worthy motive, or the most reasonable ignorance on the part of the one making a promise be regarded as consideration, if such an one is thereby obligated to nothing at all, and if no value present or prospective is exchanged? In a case like ours, where the impossibility of the promise follows from its illegality, it might well be said that, even though quite innocent from a moral point of view, a promise may still be *unlawful* in the sense that it is not capable of being legally carried out.

Let us look at the matter now from another standpoint — that of physical (as opposed to legal) impossibility: Suppose A to be the owner of a cargo of goods which he offers to sell to B for a certain price, and that B accepts the offer. Both parties believe that the cargo is in existence; but the fact is that at the time the contract was entered into ship and cargo were at the bottom of the ocean. Admittedly no contract exists in such a case. The same absence of contract results where a legal impossibility of performance intervenes, as where A's agent with full authority to do so had made a valid sale of the cargo to a third person, but A did not know this fact when he offered to sell it to B.[21] In both cases the parties are unaware of any obstacle or impossibility. Their minds "meet" in an abstraction, *viz.*, the idea of a cargo of a certain sort, under certain physical surroundings. Yet for all their "unawareness" of any impossibility of performance, the fact that performance *is* impossible prevents there being a contract.

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[18] SALMOND, JURISPRUDENCE, 5 ed, 309.

[19] JURISPRUDENCE, 11 ed, 273.

[20] LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, § 172.

[21] Hastie *v.* Couturier, 9 Exch. 102 (1853).

The ignorance of parties as to the impossibility makes no difference, and accordingly we are not obliged to seek the reason for there being no contract in some other element — such as, *e. g.*, mistake. In fact, the latter theory seems not to work well here, if the theory is true that all the law requires for the formation of a contract is that the parties agree upon the abstract character of the thing promised,[22] that is, upon a mere idea stripped of all physical attributes and surroundings — actualities and potentialities — that the only requirement is that "the promise in question must *appear*[23] to be for the doing of some act which if actually performed would be a good consideration for a binding unilateral promise." It is true that the cargo is at the bottom of the sea, but what of it? The *idea* of the cargo is undestroyed and unchanged by any possible alterations in the physical condition or location of the cargo, the parties being ignorant of the alterations. If the idea alone is the thing that matters, and it is to be released from all legal obligation to correspond with or even resemble the reality, a mile or so of salt water makes no difference.

If we change the case just put by supposing that at the time of the agreement A, by wireless message, *knew* that the cargo had gone down in mid-ocean, while B remained as before ignorant of this, and supposed that the cargo was still afloat and would in good time arrive in port, the case — as far as impossibility of performance and B's ignorance of it is concerned — seems to be identical with the A B case. We have added, however, the element of fraud. Is there any reason to believe that this added ingredient, *i. e.*, A's fraudulent intention, or his knowledge of the impossibility of performing his promise, should make the transaction any more a *contract* than it was when A was innocent of such intent and knowledge? It is just as impossible in the latter as in the former case for A now or ever to deliver, and for B now or ever to receive and pay for that particular cargo. The expressed intentions or minds of both parties are exactly as before. It is only when you come to the unexpressed mind or intent of A that you find any difference. But this old criterion of the law, the "meeting of minds," if applied here, would furnish an additional reason for denying the existence of a contract, since A thought "I am selling

[22] 2 STREET, FOUNDATIONS OF LEGAL LIABILITY, 110.

[23] Italics are mine.

to B a cargo which is at the bottom of the sea," and B thought "I am buying from A a cargo which is afloat." Of course, if the "agreement upon an abstraction theory" is held to, one should probably think there was a contract both where A was ignorant and where he was aware of the impossibility of performing, since in one as much as in the other there was a "meeting of the minds" upon an idea, *viz.*, "cargo."

This theory of agreement in the abstract does not impress one as altogether suitable for wide application in a science like the law which professes to move in and about a real world of men and affairs.[24] It would seem to the writer that such a promise, issuing forth from an agreement on an abstraction, with an actual breach certain to follow, is not one whit more valuable or likely to be the real motive of men's dealings with one another than was the making of a promise in fact, — the mere making the vocal organs to utter a succession of sounds, which in the view of Professor Ames was sufficient to form consideration, and was the essence thereof.[25] More recently legal theorists are inclined to say that if a promise cannot be performed it is a nullity. Certainly, from a practical standpoint, this would seem to be good sense. Such a promise can have no present or future value. This feature, or what we might term the hopelessness of future value or advantage, distinguishes the cargo case, the married woman's case, and the A B case from those cases where an infant exchanges promises with an adult. It seems to be now generally agreed that in this sort of transactions there is no real consideration given by the infant.[26] But while from a strictly legal and technical point of view this seems indubitable, on the other hand it seems equally indubitable that in the infant's promise there is at least a hope of value or advantage in the future. He *may* perform his promise, and that fact alone is sufficient to distinguish it from a case like ours. There is, then, something which is in the nature of consideration, at least, in the infant's agreement, although there is no mutuality of obligation.[27] This possibility of the final rendition of value also distinguishes from ours a case where A has by fraud induced B to

[24] HOLMES, THE COMMON LAW, 1, 36.

[25] 13 HARV. L. REV. 31, 32.

[26] See WILLISTON, in 27 HARV. L. REV. 528, 529; ASHLEY ON CONTRACTS, § 43. See also Ballantine, in 28 HARV. L. REV. 128, 129.

[27] Professor Ballantine, 11 MICH. L. REV. 434.

enter into a contract. A is bound while B is free; but in the ordinary case, where no impossibility of performing the agreement intervenes, the law does not deny A the right to expect that if he goes ahead with the contract upon the affirmance thereof by B, the latter will carry out his side of the agreement.

Professor Williston, defining what constitutes sufficient consideration in a bilateral contract, says:

"Mutual promises each of which *assures* [28] some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another." [29]

Apply this test to our A B case, and the result appears to be that there is no act of any nature or quality whatsoever that is "assured."

Professor Ballantine would modify the above definition and rather state it thus:

"Consideration is something of possible value given or undertaken to be given in return for something promised;" and he adds, "The test of the consideration is the possible value of the thing promised and not the effect of the promise itself." [30]

That is to say, consideration is not to be sought in the promises in fact, or in the actual performances of the promises, but in a *promised* performance, or a prospective value bargained for. Of course anyone can "undertake to give something of possible value," even though he has no idea of actually doing so, or though he well knows at the time he promises that the law will make it impossible for him to execute his undertaking. So, while this theory of consideration offers hospitality to the outcast voidable contracts (those of infants, insane or drunken persons, or others whose promises are for any reason performable only at their own option) [31] it seems to me that it justifies calling our A B case a "contract" only for the same reason that Professor Ames' theory of consideration would allow of this, *viz.*, in the one case as in the other one is dealing in reality with a "lip" promise. Anyone who undertakes

[28] Italics are mine.

[29] 27 HARV. L. REV. 527, 528.

[30] 28 HARV. L. REV. 133.

[31] 11 MICH. L. REV. 429, 430; 28 HARV. L. REV. 130; see also Professor Williston in 27 HARV. L. REV. 528.

to give what he knows he cannot give is doing nothing of any moment — nothing but moving his lips. It is a mistake to class our kind of case with voidable contracts, as Professor Ames does.[32] It belongs rather with the void contracts of married women.

Professor Ballantine thinks the fact that the promise of a married woman is not binding is not necessarily due to its being void in law, and therefore incapable of serving as consideration, and that it has been somewhat hastily assumed that there is no consideration given by a married woman's promise. In fact, he thinks that there *is* consideration here, though no mutuality of obligation.[33] This result follows readily enough, of course, if one accepts Ames' theory of consideration; but if the test of consideration is made to be a detriment in the sense of a binding obligation, either assumed in the present or assured for the future, or if it is to be found in the exchange of a real present value or a possible future value of a real kind, it is hard to see how there can be a consideration in either promise in our A B case. It is equally hard to see how there is any mutuality of obligation, if, indeed, any distinction is to be made between these two ideas.[34]

In short, no present theory of consideration seems able to account for our case as a "contract." If not dealt with on the theory of tort, it should be treated on the principles of quasi-estoppel. The man's promise is originally gratuitous, but as it was relied on by the girl innocently, reasonably, and to her disadvantage, it should be upheld. If it is to be continued to be treated by courts and theorists as a contract, I think it can only be said that it is another of those cases which the courts are ready to enforce without any consideration having been given, and which led Professor Ashley to advocate that the whole doctrine of consideration be done away with.

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[32] 13 HARV. L. REV. 33, 34. See also Professor Ballantine, 11 MICH. L. REV. 429.

[33] 11 MICH. L. REV. 429; so, Ames, 13 HARV. L. REV. 33.

[34] Williston, 27 HARV. L. REV. 525; HARRIMAN ON CONTRACTS, 2 ed., § 103.